# No. 8779

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
*Appellant,*

vs.

WALKER RIVER IRRIGATION DISTRICT
(a corporation), et al.,
*Appellees.*

**Upon Appeal from the District Court of the United States for the District of Nevada.**

## PETITION OF THE UNITED STATES FOR REHEARING.


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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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## PETITION OF THE UNITED STATES FOR REHEARING.

*To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:*

Comes now the United States of America, appellant in the above-entitled cause, and petitions this Court for a rehearing for the following reasons:

### I.

**IN THE IMPLIED RESERVATION OF WATER FOR THE WALKER RIVER RESERVATION THERE WAS RESERVED A FLOW OF WATER SUFFICIENT TO IRRIGATE ALL IRRIGABLE LANDS WITHIN THE RESERVATION.**

Under the doctrine of *Winters v. United States,* 207 U. S. 564, affirming 143 Fed. 740, 148 Fed. 684

(C. C. A. 9, 1906), there was an implied reservation of water in a quantity not merely sufficient to supply the present needs of the Walker River Indians, but sufficient to irrigate all irrigable lands of the reservation. Neither in the *Winters* case, nor in the numerous cases in which the doctrine of the *Winters* case has been followed[1] is there any indication that the amount of water reserved was less than sufficient to irrigate the irrigable lands within the reservation. Indeed, the holding in the instant case is contrary to the decision in *Conrad Inv. Co. v. United States,* 161 Fed. 829. There this Court recognized that the implied reservation of water was of a quantity measured not alone by the necessities of present use by the Indians, but as well by their possible future requirements, which, of course, would be limited only by the irrigable acreage of the reservation. Accordingly, this Court allowed the Indians an amount of water sufficient for their present needs but left the decree open for modification upon a showing of increased needs of the Indians.

Furthermore, when regard is had to the decision in *United States v. Powers,* 305 U. S. 527, it is clear that as a practical matter adequate irrigation of any part of the irrigable allotted lands of the reservation will be possible only if there is recognition of the rule that water sufficient for the irrigation of all irrigable acreage is reserved. Congress, by the Act of May 27, 1902,

1. *Conrad Inv. Co. v. United States,* 161 Fed. 829; *United States v. Powers,* 305 U. S. 527, affirming 94 F. (2d) 783; *United States v. McIntire,* 101 F. (2d) 650 (C. C. A. 9, 1939); *United States v. Parkins,* 18 F. (2d) 642 (D. Wyo. 1926); *United States v. Hibner,* 27 F. (2d) 909 (D. Idaho, 1928); *Skeem v. United States,* 273 Fed. 93 (C. C. A. 9, 1921).

32 Stat. 260,[2] as amended by the Joint Resolution of June 19, 1902, 32 Stat. 744,[3] authorized allotment of the Walker River Reservation, in accordance with the provisions of the General Allotment Act of February 8, 1887, sec. 7, 24 Stat. 390. These acts read together clearly evince assumption on the part of Congress that by the reservation of 1859 there had been reserved water sufficient for the irrigation of all irrigable lands on the reservation. They manifestly indicate the view of Congress that at that time the rights of the Indians on the reservation included the right to a flow of water sufficient to supply not only their present needs measured by the existing diversion and use, but as well their future needs determined by diversion and use which might from time

2. This Act provides: "That the Secretary of the Interior be, and he is hereby, directed to allot from the land on the Walker River Reservation in Nevada susceptible of irrigation by the present ditches or extensions thereof twenty acres to each head of a family residing on said reservation, the remainder of such irrigable land to be allotted to such Indians on said reservation as the Secretary of the Interior may designate, not exceeding twenty acres each; and when a majority of the heads of families on said reservation shall have accepted such allotments and consented to the relinquishment of the right of occupancy to land on said reservation which can not be irrigated from existing ditches and extensions thereof and land which is not necessary for dwellings, school buildings or habitations for the members of said tribe, such allottees who are heads of families shall receive the sum of three hundred dollars each to enable them to commence the business of agriculture, to be paid in such manner and at such times as may be agreed upon between said allottees and the Secretary of the Interior. And when such allotments shall have been made, and the consent of the Indians obtained as aforesaid, the President shall, by proclamation, open the land so relinquished to settlement, to be disposed of under existing laws. And the money necessary to pay said Indians is hereby appropriated out of any money in the Treasury not otherwise appropriated."

3. The Joint Resolution of June 19, 1902, 32 Stat. 744, provides: "Insofar as not otherwise specially provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the provisions of the Act approved February eighth, eighteen hundred and eighty-seven, entitled 'An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,' and other general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto."

to time in the future be made for the irrigation of their lands, including those lying under no existing ditch.

The decision in *United States v. Powers,* 305 U. S. 527, holds that under section 7 of the General Allotment Act of February 8, 1887, recognizing equal rights among resident Indians, allottees, for the cultivation of their allotments, are vested with equal rights in the water reserved for the tribe.

Under this decision each acre of irrigable land allotted under the General Allotment Act, as this was, is entitled to its pro rata share of the available water supply. There are, as this Court found, in the reservation approximately 10,000 acres of irrigable land of which some 9000 have been allotted. But under the decision of this Court the available supply is limited to 26.25 feet of water, adequate for the irrigation of only 2100 acres. As and when the allottees of the remaining land or their purchasers or lessees demand their proportionate shares of water, as is their right under the *Powers* case, the irrigable area of each of the individual allotments on the reservation now being cultivated will suffer a corresponding progressive diminution resulting in an ultimate decrease to an acreage equal to less than one-fourth of the area of the individual allotment.

## II.

### THE RECORD SHOWS THAT THE AMOUNT OF WATER REASONABLY NECESSARY TO SUPPLY THE NEEDS OF THE INDIANS EXCEEDS 26.25 FEET.

This Court states the applicable rule of law to be that:

> There was an implied reservation of water to the extent reasonably necessary to supply the needs of the Indians

and that

> The extent to which the use of the stream might be necessary could only be demonstrated by experience.

#### 1. The needs of the Indians are not properly to be determined by an experience of only seventy years.

This Court holds that the need for only 26.25 feet of water, being the amount necessary for irrigation of the area actually under cultivation by the Indians at the time of trial, has been established as a "fair measure of the needs of the Government as demonstrated by seventy years' experience". The flaw in this reasoning lies in the assumption that determination of the needs of the Indians is properly to be confined to a consideration of the experience in the relatively short period of seventy years. In dealing with the Indians the United States is dealing not merely with the rights of an individual but is seeking to solve the problems of civilizing a people who continue to occupy the status of a dependent race. Plainly, the needs of water of the Government and the Indians in

the cultivation of the lands set aside for support and development of this backward race cannot be determined by reference to the relatively short period of seventy years.

Furthermore, it is to be remembered that the rights of the Indians to use the water of this reservation have only now and for the first time been established by the decision of the Court in the instant case. The record affirmatively shows an abandonment of attempts at agriculture by reason of lack of water caused by upstream diversion. (R. 652-653, 963.) In a suit to establish water rights it is manifestly inequitable to measure those rights by the amount of Indian diversion and use when that diversion and use was obviously reduced in amount by denial by the upstream diverting defendants of the very rights here asserted.

Congress, by the Act of May 27, 1902, 32 Stat. 260, as amended by the Joint Resolution of June 19, 1902, 32 Stat. 744, authorized allotment of the Walker River Reservation in accordance with the provisions of the General Allotment Act of February 8, 1887, sec. 7, 24 Stat. 390. The size of the allotments there directed to be made clearly indicates that the Indian heads of families engaged in agriculture required a minimum of 20 acres, and the allotments to other Indians made by the Secretary, pursuant to the authority delegated to him by Congress, in tracts of 20 acres shows a determination by him that such Indians designated as allottees required as a minimum for practical agri-

culture the maximum fixed by Congress for disposition to them.

Moreover, as Judge Wolverton held in *United States v. Conrad Inv. Co.,* 156 Fed. 123, 129, since the United States holds the reservation lands in trust for the Indians, the United States in its administrative capacity, ought to be the judge of what amount of the waters of the streams of the reservation is essential for the needs of the Indians for use in connection with their lands. Under the *Powers* case, each allottee is entitled to his pro rata share of the water of the reservation, and it follows that Congress in determining that 20 acres of land were needed for each allottee also determined that the amount of water necessary for irrigation of each such tract (90 acre feet) was essential or needed to supply the needs of the individual allottee.

**2. The record requires a decree subject to modification upon a showing of an actual existing need by the Indians for more water.**

Under the Act of May 27, 1902, c. 888, 32 Stat. 260, *supra,* p. 3, 504 allotments have been made of 20 acres each, totaling 10,080 acres, approximately 9000 of which are irrigable from present constructed ditches and proposed extensions thereof. (R. 614, 641.) About 50% of the allotments are "dead allotments" (R. 614), but this term means not that the allotment is unoccupied, but that the allottee has died and the title passed to his heirs. (R. 642, 656.) There are 943 Indians attached to the reservation

(R. 656), and not every Indian who is entitled to an allotment has an allotment. (R. 657.) In general, both wife and husband have an allotment but many children have none. (R. 665.) Some of the 943 Indians attached to the reservation are not living upon it and the number of those who live on the reservation is about 500. (R. 656-657, 664.) Ninety-six farmers are living on the reservation and farming parts of 140 allotments. (R. 656.) The average farmed by each is slightly under 20 acres. (R. 664.)

The evidence contained in this record, considered in connection with the relevant statutes and regulations, amply shows that the presently foreseeable needs of land and water for the Indians will ultimately equal land in the amount of 10,000 acres and water sufficient to irrigate it.

The testimony of the foreman of irrigation in the Walker River Reservation shows that while all 10,000 acres might ultimately be cultivated by the Indians of the reservation, it is clear that at least 4000 acres may presently be expected to be cultivated by such Indians within a period of 20 years. (R. 657.) The balance, if a water supply is made available, should be leased. Under the Act of March 3, 1921, c. 119, sec. 1, 41 Stat. 1232 (25 U. S. C. sec. 393), the restricted allotments of any Indians may under rules and regulations of the Secretary be leased for farming and grazing purposes by the allottee or his heirs subject only to the officer in charge of the reservation. The pertinent portions of the Regulations of the Indian

Service, Leasing of Indian Allotted and Tribal Lands, May 9, 1929, as amended, provide:

Section 1 authorizes lease of allotted irrigable lands for not more than 10 years.

"4. Any adult allottees deemed by the superintendent to have the requisite knowledge, experience, and business capacity may be permitted to negotiate their own leases and collect the rentals therefor. All such leases, however, must be approved by the superintendent. This privilege should be granted in writing, and with some liberality, and be subject to revocation at any time the allottee proves himself unworthy of it by wasteful expenditure of the money. * * *"

"5. Allotted Indian lands should be leased only to the manifest advantage of the owners, and every able-bodied restricted Indian should be required to withhold from lease a sufficient acreage to serve as a 'homeplace' and farm unless the allottee resides elsewhere and is otherwise gainfully employed."

"22. One of the main objects in making leases should be to provide the land with such permanent improvements as will best fit it for the eventual use and occupancy of the allottee as a home, such, for example, as buildings, fences, wells, fruit trees, alfalfa, proper rotation of crops, conservation of soil fertility, prevention of erosion, etc., unless the land is already provided therewith. Each lease should therefore provide for such of the specific improvements mentioned or others as will accomplish the desired result, for the repair and upkeep thereof at the expense of the tenant, and that the structures, etc., shall remain on the

> land and become the property of the allottee. If the lessee is to erect additional improvements which he wishes to retain, the contract should include a specific provision to this effect, giving the tenant the right to remove them upon expiration of the lease. Leases for allottees who can not personally utilize the land, such as those mentally or physically incapacitated, shall provide for such improvements as will maintain or enhance the rental and market value of the land."

The statute and regulations promulgated thereunder by the Secretary constitute a recognition by the United States that the needs of the Indians may in some cases be best served by the leasing of their allotments. (cf. Act of May 18, 1916, c. 125, sec. 1, 39 Stat. 128.) However, the regulations, particularly section 22 above, clearly show that one of the objects in such leasing, aside from the obtaining of rental income, is the preparation of the land for ultimate Indian use by requiring the tenant to erect on the land certain permanent structures best suited for the utilization of the land for agriculture.

It seems apparent that Congress has adopted a long term policy for adjusting the Indians to farming and a civilized way of life. And it seems equally plain that this program should not be defeated by determining once and for all the needs of the Indians by reference solely to their use of water during the past seventy-five years.

Wherefore, for the foregoing reasons, and because of the importance and far-reaching effects of the de-

cision, the petitioner respectfully requests that rehearing be granted.

Dated, July 5, 1939.

Respectfully submitted,

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## Certificate of Counsel.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, July 5, 1939.

Roy W. Stoddard,
Special Assistant to the Attorney General,
*Of Counsel for Appellant and Petitioner.*